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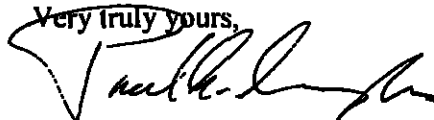
The Honorable Anne K. Quinlan, Esq
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S W
Washington, DC 20423-0001

**Re: Canadian National Railway Company and Grand Trunk Corporation –
Control – EJ&E West Company (STB Finance Docket No. 35087)**

Dear Ms. Quinlan:

Enclosed for filing in the above referenced docket please find Applicants' Response to the Village of Barrington's Motion For Waiver of or Permission to Exceed Page Limits (designated as CN-54)

Very truly yours,



Paul A. Cunningham

Counsel for Canadian National Railway Company
and Grand Trunk Corporation

Enclosure

cc All parties of record

EXPEDITED HANDLING REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No 35087

CANADIAN NATIONAL RAILWAY COMPANY
AND GRAND TRUNK CORPORATION
- CONTROL -
EJ&E WEST COMPANY

**APPLICANTS' RESPONSE TO THE VILLAGE OF BARRINGTON'S MOTION FOR
WAIVER OF OR PERMISSION TO EXCEED PAGE LIMITS**

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**APPLICANTS' RESPONSE TO THE VILLAGE OF BARRINGTON'S MOTION FOR
WAIVER OF OR PERMISSION TO EXCEED PAGE LIMITS**

Canadian National Railway and Grand Trunk Corporation (collectively, "Applicants") hereby respond to the Village of Barrington's ("Barrington") Motion for Waiver of or Permission to Exceed Page Limits Regarding its Filed Petition for Stay (BARR-8), filed January 7, 2008 ("Petition for Waiver"). This Petition for Waiver follows on the heels of Applicant's Motion to Strike Barrington's Petition for Stay, filed on January 6, 2009, because it exceeded the 10 page limit of 40 C.F.R. § 1115.5(c) by 48 pages. Barrington says that it did so "inadvertently."

Inadvertence or ignorance of the Board's rules is traditionally no excuse, but Barrington asks the Board to reward its violation by retrospectively waiving entirely the rule that it violated. If the Board were to do so, it would undermine both its page limits rule and its requirement that waivers of procedural rules be sought in advance, it would set a precedent for an extension of page limits far beyond anything it has ever sanctioned even in response to a timely and proper

waiver request, and it would severely and unfairly prejudice other parties, including Applicants, by requiring them to respond in a few days to an excessively long stay petition, including merits arguments that Barrington has not previously made, in order to defend the effectiveness of the Board's decision

The time Barrington spent developing post-hoc rationalizations for its waiver request should instead have been spent shortening its stay petition to comply with the rules. The Board should now reject the untimely waiver request and instruct Barrington to promptly file a shorter stay petition that complies with the Board's rules if Barrington still wishes to seek a stay

In addition to being untimely, Barrington's waiver petition lacks adequate support. Barrington fails to cite a single Board precedent permitting the filing of a petition to stay pending judicial review that is anywhere near the length of Barrington's 58-page document.¹ Further, there is nothing unique about this case that could justify such a departure from the Board's rules. Barrington cites (at page 3) the Board's 80-page decision, but that decision is far shorter than

¹ The cases cited by Barrington only illustrate how extreme and unprecedented is its request. The filings at issue in *Public Views on Major Rail Consolidations*, STB Ex Parte No 582 were not petitions for stays, but consolidated responses of two parties (each of which was arguably entitled to 10 pages) to two separate petitions for stays. Even then, those responses were only 15 and 18 pages long. Likewise, the filing at issue in *Union Pac Corp – Control – Chicago & N W Transp Co*, STB Finance Docket No. 32133 (Sub-No 4), was a consolidated response to two stay petitions. As for the two remaining cases cited by Barrington, one involves a request to exceed page limits in response to a petition for stay (not for a stay petition), and Barrington does not suggest that in either case the pleadings at issue exceeded the Board's established limits by nearly the extent that Barrington's does.

Other cases not cited by Barrington reinforce the fact that Barrington's request is far out of line. In most cases where the Board grants a "reasonable request" to exceed a page limit, the pleading at issue is at most a few pages over the limit. See *Tongue River R R Co – Construction & Operation – W Alignment*, STB Finance Docket No. 31806 (Sub No 3), slip op at 5 (STB served Nov 7, 2007) (granting petition to exceed 1115 5(c)'s 10 page limit by 5 pages where pleading "involves two Board decisions and a myriad of complex issues"). Indeed, in the only case that Applicants are aware of where a petitioner sought to double the applicable limit (from 20 to 40 pages) the Board denied the request. *PPL Montana, LLC v The Burlington Northern & Santa Fe Ry Co*, STB Docket No. 42054, slip op at 1 (STB served Aug 29, 2002).

decisions in other proceedings in which parties were required to adhere to the 10-page limit for petitions to stay.² Barrington argues (at page 3) that it must cover four elements as part of its stay petition, but those same four elements apply in all stay proceedings. Barrington also stresses (at pages 3-4) that it seeks to prevent “impacts” that would be “thrust upon it involuntarily,” but petitions for stay generally seek to prevent impacts the petitioner did not invite.

Unable to identify exceptional circumstances meriting a waiver, Barrington’s arguments devolve to a more-or-less facial challenge to the Board’s 10-page limit rule on the basis that it “artificially constrain[s] the discussion of the issues and harms relevant to the stay standard.” *Id.* at 4. In both its waiver argument and its stay petition, Barrington ignores the sound policy underlying the Board’s page limits, which are “intended to encourage parties to focus on important issues.” *San Jacinto Rail Ltd – Build-Out to the Bayport Loop Near Houston, Harris County, TX*, STB Finance Docket No. 34079, slip op. at 10 n. 27 (STB served July 9, 2003).³ As noted in Applicant’s Motion to Strike (at page 2), Barrington’s effort to “elaborate on” its arguments “in support of its Petition for Stay” abuses 49 C.F.R. § 1115.15 by attempting to take “yet another bite at the apple” in the form of additional merits argument beyond the record established at the time of the Board’s final decision.

² Apparently none of the parties seeking a stay found it necessary to exceed the Board’s page limits in *Conrail* (an over 420-page slip opinion) or *UP/SP* (290-page slip opinion). Indeed, when the city of Reno sought a stay pending judicial review of the *UP/SP* decision, it was able to make its request in 3 pages.

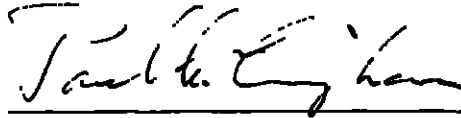
³ As the Seventh Circuit has noted, “[t]he page limit is designed as much for the benefit of the litigants as for the benefit of the court. If extra pages mean stronger argument, enforcement of the page limit protects those who obey the rules. But extra pages may not be stronger argument. A limitation induces the advocate to write tight prose, which helps his client’s cause.” *Morgan v. South Bend Community Sch. Corp.*, 797 F.2d 471, 480 (7th Cir. 1986).

Barrington's effort to file an exceedingly overlong petition also threatens to undermine the Court of Appeals' rules. As Applicants pointed out in their Motion to Strike, if the Board allows the 58-page petition, Barrington might attach that petition to a petition to stay before the Court of Appeals, effectively seeking to evade the applicable 20-page limit under Federal Rules of Appellate Procedure 27(d)(2). Barrington's petition for waiver does not deny that it may seek to do so. Moreover, the FRAP 27(d)(2) 20-page limit highlights the extreme and unjustified nature of Barrington's request for a page limit roughly three times that length. If 20 pages suffice for briefing a stay petition before a Court that will generally have no familiarity with the administrative record and issues presented, there can be no justification for a petition to this Board that is three times that length.

Finally, the prospect of allowing Applicants to file a similarly overlong response on the merits of the stay is insufficient to cure the harm that granting Barrington's waiver petition would cause. Applicants and other parties who may seek to respond to Barrington's stay petition are subject to short time limits that are suitable for a prompt response to a 10-page document, not a 58-page document, and the Board is also under pressures to render a speedy decision.

Barrington's Petition for Waiver should be denied

Respectfully submitted,



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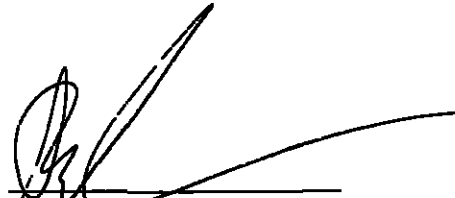
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*Counsel for Canadian National Railway Company
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January 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of January, 2009, served copies of Applicants' Response to the Village of Barrington's Motion For Waiver of or Permission to Exceed Page Limits (designated as CN-54) upon all known parties of record in this proceeding by first-class mail or a more expeditious method



Alexander D Coon